HON'BLE SRI JUSTICE RAMESH RANGANATHAN

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W.P. NO. 25923 of 1997

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DATED: 25-04-2007

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Between:-

A.P. State Civil Supplies Corporaltion Employees Sangham, represented by its General Secretary Sri S. Rajeswara Rao, Hyderabad

…PETITIONER

AND

Commissioner of Civil Supplies and Consumer Affairs, Hyderabad and another.

..RESPONDENTS

HON'BLE SRI JUSTICE RAMESH RANGANATHAN

W.P. No. 25923 of 1997

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O R D E R

Questioning the proceedings of the 1st respondent dated 22.08.1997 the Andhra Pradesh State Civil Supplies Corporation has approached this Court by way of the present writ petition.

Pursuant to an order of this Court in W.P. No.27244 of 1996 directing the 1st respondent to pass necessary orders, on the proceedings of the 2nd respondent dated 17.06.1996, the 1st respondent passed the impugned order dated 22.08.1997 informing the petitioner union that it was not possible to consider the request of the 2nd respondent for permitting payment of ex-gratia to the employees of the A.P. State Civil Supplies Corporation.

The 2nd respondent, in his proceedings dated 17.06.1996, had informed the 1st respondent that the A.P.

State Civil Supplies Corporation had been consistently paying bonus/ex-gratia to its employees right from the inception i.e. from 1976-77 onwards, that it had initially paid 10% and had periodically increased it to 20%. However, the payment of bonus/ex-gratia was later brought down to the statutory minimum limit of 8.33%. The 2nd respondent informed that payment of ex-gratia/bonus to the employees of the Corporation, for the year 1992-93, had not been concurred to by the Finance Department of the Government of Andhra Pradesh. The 2nd respondent informed that, while 15% dividend had not been paid to the Government, an amount far in excess thereof had been paid, in different forms as per the advise of the Finance Department, to enable the Corporation to minimize its tax liability. The 2nd respondent furnished statistical information of the income of the A.P. State Civil Supplies Corporation to the effect that the income received on various commodities, in competition with the private sector, such as LPG items was Rs. 11.94 lakhs, kerosene Rs.10-14 lakhs, Non-levy sugar Rs.20.43 lakhs and other commodities Rs. 1.28 lakhs. The 2nd respondent stated that the income received from other commodities, which were in competition with the private sector, was Rs.43.79 lakhs and, when compared with the total income of Rs. 131.61 lakhs, it came to 33.24%. According to the 2nd respondent the income received from other commodities, which were in competition with the private sector, was more than 20% of the total income and that the stipulation under Section 20 of the Payment of Bonus Act had been satisfied. The 2nd respondent further informed that the organization did not fall within the purview of Section 32, there was no need to exempt the Corporation under Section 36, and from the angle of profitability, or from the activities in competition with the private sector or from the customers angle, the Corporation was eligible to pay bonus/ex-gratia to its employees. The 2nd respondent informed that, customarily, the Corporation had paid ex-gratia only and that it was prudent to continue to pay ex-gratia. The 2nd respondent further informed that the Board, in its meeting held on 05-06-1996, had decided to recommend to the Government to issue necessary orders permitting the Civil Supplies Corporation to pay ex-gratia, within the statutory limit, to all eligible employees. The Government was requested to issue necessary orders permitting the Corporation to pay ex-gratia to the employees of the Civil Supplies Corporation for the years 1992-93, 1993-94 and 1994-95. It is these proceedings dated 17.06.1996, seeking permission of the Government to pay ex-gratia to the employees of the Corporation, which was rejected by the 1st respondent in its proceedings dated 22-08-1997 which order is impugned in the present writ petition.

Sri M. Vidyasagar, learned counsel for the petitioner, would contend that the Corporation has not been exempted from the purview of the Payment of Bonus Act as the alleged order of exemption in G.O. Ms. No. 366, dated 29-10-1993, has not been notified in the Andhra Pradesh Gazettee as required under Section 36 of the Act. Learned counsel would contend that since the ingredients of Section 20 of the Payment of Bonus Act are satisfied, the Civil Supplies Corporation was statutorily bound to pay minimum bonus, of 8.33%, as stipulated under Section 10 of the Payment of Bonus Act. Learned counsel would place reliance on the judgment of this Court in **S.SAMUEL AND OTHERS V. STATE OF A.P.**[1] as confirmed in Writ Appeal No. 92 of 1997, and the judgment of the Supreme Court in **STATE OF TAMILNADU V. K. SABANAYAGAM AND ANOTHER**[2].

Sri D. Linga Rao, learned Standing Counsel for the Corporation, on the other hand, would contend that the Government had issued G.Os from time to time which would clearly show that the Civil Supplies Corporation is a

non-profit making organization established only to ensure proper distribution of essential food articles. Learned Standing Counsel would contend that, since the Government had issued a general order in G.O.Ms.No. 366 dated 29.10.1993 whereby it was decided that, pending a final decision in the matter, no organization should sanction/pay bonus/ex-gratia until further orders, this G.O. was an exemption order under Section 36 of the Act and as such the Corporation was not statutorily required to pay bonus. Learned Standing Counsel would refer to the averments in the counter-affidavit to submit that even if the Corporation is held to come within Section 2(16) of the Payment of Bonus Act, the conditions stipulated in Section 20 of the Act are not fulfilled by the Corporation, as the Corporation is working on a no profit no loss basis and any incidental profit earned is being ploughed back into working capital for benefit of the general public to serve whom the Corporation was established by the Government. It is also stated in the counter affidavit that the Corporation was only paying ex-gratia upto the year 1991-92 and, due to the changed circumstances, such payment was discontinued. Learned counsel would contend that the Corporation does not satisfy the requirements of Section 20 of the Payment of Bonus Act and that there is no separate income for the Corporation other than the subsidy granted by the Government. Reference is made to the counter affidavit filed by the 2nd respondent to submit that the question whether the provisions of the Payment of Bonus Act applies to employees of the A.P. Civil Supplies Corporation is a matter to be adjudicated under the provisions of Payment of Bonus Act for which an elaborate machinery is provided under the Act and that this dispute could only be settled before the appropriate forums.

Before examining the rival contentions, it is necessary to note the relevant provisions of the Payment of Bonus Act. Section 2 (16) defines, "establishment in public sector" to mean an establishment owned, controlled or managed by the Government as defined in Section 617 of the Companies Act, 1956. It is not in dispute that the A.P. State Civil Supplies Corporation falls within the definition of "establishment in public sector", as defined in Section 2 (16) of the Payment of Bonus Act. Section 10 relates to payment of minimum bonus and thereunder, subject to the provisions of the Act, every employer shall be bound to pay to every employee in respect of the accounting year commencing on any day in the year 1979 and in respect of every subsequent accounting year, a minimum bonus which shall be 8.33 per cent of the salary or wage earned by the employee during the accounting year whether or not the employer has any allocable surplus in the accounting year. Thus, irrespective of whether the Corporation has any allocable surplus, it is statutorily required under Section 10 of the Payment of Bonus Act to pay a minimum bonus of 8.33 per cent, subject, of course, to the other provisions of the Payment of Bonus Act. Section 20 relates to the application of the Act to establishments in public sector in certain cases and reads thus:

> "(1) If in any accounting year an establishment in public sector sells any goods produced or manufactured by it or renders any services, in competition with an establishment in private sector, and the income from such sale or services or both is not less than twenty percent of the gross income of the establishment in public sector for that year, then, the provisions of this Act shall apply in relation to such establishment in public sector as they apply in relation to a like establishment in private sector.
> (2) Save as otherwise provided in sub-section (1), nothing in this Act shall apply to the employees employed by any establishment in public sector."

Section 22 provides that, where any dispute arises between an employer and his employees with respect to the bonus payable under this Act or with respect to the application of this Act to an establishment in public sector, then, such dispute shall be deemed to be an industrial dispute within the meaning of the Industrial Disputes Act, 1947 or

of any corresponding law relating to investigation and settlement of industrial disputes in force in a State and the provisions of that Act or, as the case may be, such law, shall, save as otherwise expressly provided, apply accordingly.

Under Section 32, the Act is held not to apply to certain classes of employees. Section 36 which confers power on the appropriate Government to exempt an establishment from the provisions of the Act, reads thus:

> "**Power of Exemption**:- If the appropriate Government, having regard to the financial position and other relevant circumstances of any establishment or class of establishments, is of opinion that it will not be in public interest to apply all or any of the provisions of this Act thereto, it may, by notification in the Official Gazette, exempt for such period as may be specified therein and subject to such conditions as it may think fit to impose, such establishment or class of establishments from all or any of the provisions of this Act."

The first question which arises for consideration is whether the A.P. State Civil Supplies Corporation can be said to have been exempted from the purview of the Payment of Bonus Act under G.O. Ms. No. 366, dated 29.10.1993. Under the said G.O. the Government noted that many Public Sector Undertakings and Co-operative Enterprises which were becoming sick or making losses were approaching the State Government for release of funds for payment of salaries and allowances, working capital and additional capital for expansion/modernization for getting over the sickness, that the Public Enterprises which were covered by the Payment of Bonus Act, 1965, and which were not specifically exempted under Section 20 of the Act, had been paying Bonus as per the provisions of Bonus Act, 1965, while many other Public Enterprises were also paying bonus in the form of ex-gratia on the same lines as that of the Payment of Bonus Act, 1965, although it was not mandatory. The Government also noted that, though a number of State Level Public Enterprises and Co-operative organizations were running in losses, the Government had been paying bonus/Ex-gratia to their employees regardless of their financial position or the performance of their organizations. The Government noted that Section 36 of the Bonus Act empowered it to exempt any establishment, or class of establishment, from payment of bonus if the financial position or other relevant circumstances warrant such a course of action in public interest and that, in accordance with this statutory position, the issue of detailed instructions governing payment of bonus/ex-gratia was separately under process in the Government. Pending a final decision in the matter, the Government decided that no organization should sanction/pay bonus/ex-gratia until further orders. The concerned administrative departments of the Secretariat were requested to ensure that these instructions were strictly complied with by the Public Enterprises under their control. G.O.Ms.No. 366 dated 29.10.1993 can not be said to be an order of exemption under Section 36 of the Payment of Bonus Act. The very fact that G.O.Ms. No. 366, dated 29.10.1993 is not an order of exemption, under Section 36, is clear from paragraph-5 of the G.O. itself wherein the Government, while noting that it had the power of exemption under Section 36 of the Act, merely held that the issue of detailed instructions was under process. G.O. Ms. No. 366 dated 29-10-1993 was an order issued pending final decision in the matter by the Government and cannot be said to be an order of exemption. Further, Section 36 requires the appropriate Government to apply its mind to the financial position and other relevant circumstances of any establishment or class of establishments and form an opinion that it is not in public interest to apply all or any of the provisions of the Payment of Bonus Act. It is only after formation of such an opinion is the Government required to notify its order of exemption in the Official Gazette and the period for which, and the conditions subject to which, the establishment or class of establishments were to be exempted from the provisions of the Payment of Bonus

Act. None of the ingredients of Section 36 of the Payment of Bonus Act are satisfied in the present case and as such the contention that G.O. Ms. No. 366 dated 29-10-1993 is an order of exemption must necessarily be rejected.

The question which remains for consideration is whether Section 20 of the Payment of Bonus Act would apply. Under sub-section (1) if, in any accounting year, an establishment in the public sector (a) sells any goods produced or manufactured by it, or (b) renders any services in competition with an establishment in private sector; and the income from such sale or services or both is not less than twenty percent of the gross income of the establishment in the public sector for that year, then, the provisions of the Act would apply in relation to such an establishment in public sector as they apply in relation to a like establishment in private sector.

Both Sri M.Vidyasagar, learned counsel for the petitioner, and Sri D. Linga Rao, learned Standing Counsel, would agree that the A.P. State Civil Supplies Corporation does not produce or manufacture any goods and as such the question of it selling any goods, produce or manufactured by it, does not arise. What is required to be examined is whether the A.P. State Civil Supplies Corporation renders any services, in competition with an establishment in private sector, and whether the income from such services is not less than 20 per cent of its gross income for that year. Sri M. Vidyasagar, learned counsel for the petitioner would emphasise, rightly so, that the 2nd respondent had, in his proceedings dated 17.06.1996, informed the 1st respondent that the income of the A.P. State Civil Supplies Corporation, in competition with the private sector, was 33.24% which is more than the 20% stipulated under Section 20 (1) of the Payment of Bonus Act. The question, which, however, remains is whether the income earned by the Corporation on sale of LPG items, kerosene, Non-levy Sugar and other commodities can be said to be an income earned from "rendering any services", for if it is only if the sale of these items amounts to "rendering any services'"

the ingredients of Section 20 (1) of the Payment of Bonus Act be satisfied.

Sri M. Vidyasagar, learned counsel for the petitioner, would contend that the A.P. State Civil Supplies Corporation has been established to ensure proper distribution of essential articles, through the aegis of the public distribution system, to ensure that the monopolistic practices of the private sector are curtailed. Learned counsel would contend that the distribution of these essential articles, through the public distribution system at subsidized rates, would, in effect, amount to the A.P. State Civil Supplies Corporation "rendering services", and, since this service rendered by the A.P. State Civil Supplies Corporation is in competition with the private sector, the ingredients of Section 20(1) of the Payment of Bonus Act are satisfied. While this submission of Sri M.Vidyasagar, learned counsel for the petitioner, cannot be said to be without merit, it cannot, however, be lost of sight of that the question whether the A.P. State Civil Supplies Corporation is "rendering any service" is a mixed question of fact and law and, ordinarily, when facts are in dispute, this Court would refrain from exercising its jurisdiction under Article 226 of the Constitution of India, more so when the Act itself provides for an effective remedy for adjudication of such disputes.

Now, the judgments relied upon by Sri M.Vidyasagar, learned counsel for the petitioner. In **S. SAMUEL**[1], a learned Single Judge of this Court, while dealing with the question of payment of bonus/ex-gratia to employees of A.P. Foods Limited, held that the establishment was not exempted under Section 36 of the Payment of Bonus Act.

While examining the question, whether Section 20 of the Act applied or not, the learned Single Judge held that it was not the case of the 2nd respondent society that no private company was producing food of nutritious value and they were not available in open market, that several private companies were producing nutritious foods under their own patent names and that the respondents did not place any material that it was not making profits of more than 20% of the gross income of the establishment. The Learned Single Judge, therefore, held that the provisions of the Act were applicable and, under Section 10 of the Act, a minimum bonus of 8.33 per cent was requred to be paid. The 2nd respondent in the said writ petition was involved in production of nutritious food for supply to school and pre-school children, pregnant women, lactating mothers and other categories of beneficiaries. The question whether the establishment was "rendering any services", in competition with the private sector, did not arise for consideration in **S.Samuel**[1]. It is true that this order was confirmed in appeal but even before the Division Bench the question which arises for consideration in the present writ petition was not in issue.

Sri M.Vidyasagar, learned counsel for the petitioner, would, however, contend that the very fact that the A.P. Foods Limited sells its products at subsidized rates would necessitate an inference that it was rendering services and, since this Court had adjudicated the matter on merits and directed payment of bonus, a similar direction must be issued by this Court also. A perusal of the order in **S.Samuel**[1] would reveal that the scope and purport of the expression "rendering any services" in Section 20 (1) of the Payment of Bonus Act did not arise for consideration. Even otherwise, it is for this Court to decide, on the facts and circumstances of each case, whether to exercise discretion and adjudicate disputed questions of fact in writ proceedings under Article 226 of the Constitution of India. The mere fact that in **S.Samuel**[1] this Court had chosen to adjudicate disputed questions of fact would not necessitate this Court to do so in every case where the payment of bonus is in issue. These are all matters of discretion for the High Court to decide on the facts and circumstances of each case. I am satisfied that, in the present case, these questions can be better adjudicated, on a dispute being raised, and referred for adjudication to the Industrial Tribunal, under Section 22 of the Payment of Bonus Act.

In **State of Tamilnadu v. K. Sabanayagan and another**[2], the question which arose for consideration before the Supreme Court was whether the order passed by the Government of Tamilnadu, under Section 36 of the Payment of Bonus Act, exempting the Tamilnadu Housing Board from the provisions of the Act was valid or not. The Supreme Court held that the exemption order was not valid. The question whether the establishment was "rendering any services" that too, in competition with an establishment in the private sector and consequently came under the purview of Section 20(1) of the Payment of Bonus Act did not arise for consideration in **K.Sabanayagam**[2] .

Adjudication of the question whether the A.P. State Civil Supplies Corporation is "rendering any services", in competition with an establishment in the private sector, is essential to determine whether sub-section (1) of Section 20 of the Act applies, for otherwise under sub-section (2), the Payment of Bonus Act would not apply to employees of the establishment in the public sector. It is only if the A.P. State Civil Supplies Corporation is held to be "rendering any services", in competition with an establishment in the private sector, would the employees of the A.P. State Civil Supplies Corporation be entitled for payment of bonus, that too, if in any accounting year such

income is not less than 20 per cent of the gross income of the establishment. Since these questions are better adjudicated on a dispute being raised and thereafter referred to the Tribunal under the Industrial Disputes Act, I see no reason to exercise jurisdiction under Article 226 of the Constitution of India to examine or adjudicate these issues. Leaving it open to the petitioner, if they so chose, to avail the remedy under Section 22 of the Payment of Bonus Act, the writ petition is dismissed. However, in the circumstances, without costs.

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RAMESH RANGANGATHAN,J

Dated: 25-04-2007
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[1] 1997(2) ALD 76

[2] AIR 1998 SC 344